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No. 77-792

In the Supreme Court of the United States

OCTOBER TERM, 1977

BERNARD G. RUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 559 F. 2d 975.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1977. A petition for rehearing was denied on November 2, 1977. A petition for a writ of certiorari was filed on December 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether inquiry of two defense witnesses on cross-examination about their prior refusal to testify before the grand jury warrants reversal of petitioner's conviction.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of 103 counts charging that he embezzled funds from union and employee welfare benefit plans (in violation of 29 U.S.C. 501(c), 18 U.S.C. 664), racketeering (in violation of 18 U.S.C. 1962(c)), false statements on income tax returns (in violation of 26 U.S.C. 7206(1)) and failure to keep labor union records (in violation of 29 U.S.C. 436, 439). Petitioner was sentenced to concurrent terms of five years' imprisonment on each count and fined a total of $50,000 on five different counts. He was further ordered to forfeit all his union and trust fund positions and his right to seek such positions in the future. In a comprehensive opinion (Pet. App. A 1-44), the court of appeals affirmed his conviction and the order of forfeiture, but deleted the provision that petitioner could not seek and hold office in the future.

1. Petitioner was the Special International Representative of the Laborers' International Union of North America, President of the Southwest Florida Laborers' District Council (District Council)—an umbrella organization supervising several unions—President of the Concrete Products & Material Yard Workers Local No. 666, Business Manager of Local No. 478, and trustee of several labor trust funds. During his occupancy of these positions, petitioner embezzled monies from these unions and trust funds by submitting duplicate expense vouchers, mostly for travel and entertainment, and thereby receiving multiple reimbursements for expenses incurred (Pet. App. A 8).

The evidence also showed that petitioner granted himself over $300,000 in unauthorized salary increases as an officer of Local 666 and the District Council, that he inadequately documented disbursements from the union treasury and that he received substantial income in excess of the amount reported on his income tax returns (Pet. App. A 9).

2. Kenton Wells, an organizer for the District Council, and Jack Gordon, an organizer for the District Council and Local 666, were two of eight defense witnesses who testified, in corroboration of petitioner's evidence, that during the relevant years petitioner had given subordinates large amounts of cash for use in organizing union campaigns and had spent large amounts of cash entertaining management figures (Pet. App. A 11).

In an effort to impeach the testimony of Wells, the government brought out on cross-examination that he had previously refused to testify before a federal grand jury investigating the activities of southern Florida laborers' organizations.[1] At one point, Wells volunteered that he "took the Fifth Amendment" (Tr. 1521).[2] Defense counsel objected on the grounds that "[t]here is nothing inconsistent about a witness' trying to invoke the Fifth Amendment in front of a grand jury and testifying here" (Tr. 1521). The court overruled his objection, stating: "I think that is proper cross-examination," but cautioned the government to bring out that fact and "then drop it" (Tr. 1522).

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[1]The government inquired as follows (Tr. 1522-1523):

Q. Without respect to the exact date, sir, did you appear twice before the Federal Grand Jury?

A. Yes, sir.

Q. Were you asked questions concerning your labor-union activities and Mr. Rubin?

A. Yes, sir.

Q. Did you refuse to testify on both of those occasions?

A. Yes, sir, I did.

[2]The full colloquy is set out in the opinion of the court of appeals (Pet. App. A 11-13, n. 1).

Jack Gordon was also questioned as to his previous refusal to testify (Tr. 1622-1623):

Q. Mr. Gordon, did you appear at the Federal Grand Jury on May 27, 1975?

A. I don't remember the date, I appeared there, yes, at the grand jury.

Q. Did you ever refuse to testify?

A. Yes, I did.

Petitioner's counsel again interposed an objection which the trial court overruled (Tr. 1623).

As part of summation, the prosecutor commented on the testimony of Wells and Gordon, arguing that there was a contradiction between their corroboration of petitioner's exculpatory story at trial and their refusal to testify before the grand jury (Pet. App. A 14).

3. In upholding petitioner's conviction, the court of appeals found that the government's impeachment of Wells and Gordon was improper but did not constitute reversible error. In reaching this conclusion, the court applied the harmless error test of *Kotteakos* v. *United States*, 328 U.S. 750, 764-765, rather than the constitutional standard of *Chapman* v. *California*, 386 U.S. 18, finding that the improper impeachment "tainted [petitioner's] trial at most to such a marginal extent that the judgment must be affirmed * * *" (Pet. App. A 24-25).

ARGUMENT

It is settled that "the Fifth Amendment privilege [against self-incrimination] is a personal privilege * * *" *Couch* v. *United States*, 409 U.S. 322, 328. See also *Fisher* v. *United States*, 425 U.S. 391, 396-397.[3] Accordingly, "a defendant may not object to the violation of another person's privilege * * *" *Doyle* v. *Ohio, supra*, 426 U.S. 610, 627 (Stevens J., dissenting) (footnote omitted). See *Massiah* v. *United States*, 377 U.S. 201, 206-207; cf. *Alderman* v. *United States*, 394 U.S. 165, 174. Since the government referred to the silence of witnesses, not of petitioner, the question whether eliciting that fact on cross-examination is reversible error is governed by the principles enunciated in *Namet* v. *United States*, 373 U.S. 179. The first inquiry under *Namet* is whether the government made "a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege." 373 U.S. at 186. While the prosecutor in this case did knowingly ask the witnesses about their prior silence, he did so with the approval of the trial court (Tr. 1518-1519). Nor was the prosecutor acting in bad faith. He believed that he was entitled to bring out on cross-examination the fact that these same witnesses who were now presenting detailed exculpatory testimony regarding petitioner's union affairs had previously refused to give any testimony about the subject. Even if this view was mistaken, it was not a "conscious and flagrant attempt" to deny petitioner his rights.

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[3]In both *United States* v. *Hale*, 422 U.S. 171, and *Doyle* v. *Ohio*, 426 U.S. 610, it was *defendant* who was questioned at his trial about *his* silence.

Nor was petitioner unfairly prejudiced under the second aspect of the *Namet* test, which justifies reversal where the "inference from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination." 373 U.S. at 187. As the court below found in this regard (Pet. App. A 31):

> the possibility that the jury believed [defense witnesses] Feder and Wright but rejected the defense because of the improper impeachment of Gordon and Wells is remote. Moreover, given the sum of Gordon's and Wells's testimony, the possibility is equally slim that the jury disbelieved the remaining defense witnesses but would have accepted the defense absent the improper impeachment. In light of the balance of the evidence and the place of Wells and Gordon in the defense lineup, we cannot conclude that the erroneous impeachment use of their refusal to testify before the grand jury was prejudicial under the *Kotteakos* standard. Were that balance any different or the testimony of Wells and Gordon of any more apparent importance, different considerations would obtain. As this record stands, however, we harbor nothing approaching a "grave doubt" that the error did not exert a substantial influence on the jury. We think it clear that the error was harmless. [Footnote omitted.][4]

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[4]There is no merit to petitioner's claim that the decision below conflicts with the rule established by the Ninth Circuit in *United States* v. *Price*, 474 F. 2d 1223, that a record of grand jury proceedings must be made, when requested, absent a government showing that it has a legitimate and compelling interest to be served by non-recordation. The government did record the testimony of all witnesses and gave it to the defense; only the remarks and comments of the prosecutor and his instructions of law to the grand jury were unrecorded. While it may be the better practice to record the testimony of all witnesses and the comments of the prosecutor (see *United States* v. *Peden*, 472 F. 2d 583 (C.A. 2)), there is no constitutional or statutory requirement of recording. See, *e.g.*, *United States* v. *Solimine*, 536 F. 2d 703 (C.A. 6), vacated on other grounds, 429 U.S. 990; *United States* v. *Flanagan*, 455 F. 2d 263, 265 (C.A. 5), certiorari denied, 404 U.S. 1060. Indeed, many comments during a criminal trial are "off the record" and hence not recorded. As the court below found (Pet. App. A 32), petitioner's unsubstantiated, speculative assertions of improprieties in the proceedings" are insufficient to show that he was denied fundamental fairness so as to merit dismissal of the indictment. The Ninth Circuit itself requires a showing of prejudice and has not, as petitioner suggests (Pet. 45), adopted a "prophylactic rule" whose violation without more requires dismissal. *United States* v. *Price*, *supra*, 474 F. 2d at 1226.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[5]

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[5]The Court may wish to defer action on the petition until the court of appeals determines whether it will entertain a second petition for rehearing presently pending before that court and to which the United States has been asked to respond. See petitioner's Motion to Withhold Determination.

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